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TALMUDIC JURISPRUDENCE, EQUITY, AND THE CONCEPT OF *LIFNIM MESHURAT HADIN*

By JAMES A. DIAMOND*

In the beginning G-d created the world with the attribute of strict Law. Upon the realization that the world could not withstand this (as a blueprint for its existence), He tempered Law with the attribute of Mercy.¹

Without justice, life would not be possible and, even if it were, it would not be worthwhile.²

I. INTRODUCTION

Within the Jewish legal tradition, ethics and law, conscience and legal obligations are inextricably bound together in an attempt to raise the human condition above a robot-like obedience to black-letter legislation. The Talmud recognized that moral deliberations often lead to responses in man's relations and dealings with his fellow man different than those imposed upon him by the law. From the period of Ecclesiastes³ cynical assertion that "under the sun the place of judgment, . . . wickedness was there . . ."⁴, to the Talmudic observation that, "Where there is law there is no charity,"⁵ right to the contemporary speculation by Cardozo that, "When talking about justice, the quality we have in mind is charity, and this, though one quality, is often contrasted with the other,"⁶ — Jewish legal scholars were aware of the chasm between law and justice. Talmudic jurisprudence attempted to remedy that anomalous situation by developing various principles of equity, among which that of *Lifnim meshurat hadin* or "beyond the strict line of the law" exemplifies the preference displayed for following moral dictates rather than legal precedents. Although because of the distinct nature of Jewish law,⁷ a wholly

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¹ Author's translation of Midrash in *Rashi* Genesis 1:1.

² Del Vecchio, *Justice, An Historical and Philosophical Essay* (New York: Philosophical Library, 1953) at 177.

³ Traditionally attributed to King Solomon who, interestingly enough, was respected as a just ruler in that he was extremely innovative in the manner in which he meted out justice during his rule, combining legal wisdom with common sense; witness the famous case of authenticating a child's true parent in a very unorthodox fashion.

⁴ Ecclesiastes 3:16.

⁵ Babylonian Talmud, ed. Epstein (London: Soncino Press, 1935) at *Nezikin III, Sanhedrin* 6b. The Hebrew word for "charity" has as its root the word for "justice."

⁶ Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924) at 87.

⁷ That is, rooted in a divine source where there is an integral link between law and morality.

separate institutional framework based on equity did not arise as in the English legal tradition, the basic catalyst for the formulation of those principles was essentially identical:

[to] correct Men's Consciences for Frauds, Breaches of Trusts, Wrongs and Oppressions of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus*.⁸

The intention of this paper is to examine the role attributed to *Lifnim meshurat hadin* (hereafter referred to as *Lifnim*) within the framework of Jewish law and to see whether it was incorporated as a valid and judicially accepted legal maxim. We are confronted with an early attempt to bridge the gap between strict law and good conscience, while still maintaining a consistent legal system. It was not allowed to become the subject of fanciful judicial whims, but rather, "[H]ebrew *Yosher* (equity), like English equity, walks in the paths of the law; it is its reflecting shadow."⁹

II. THE NATURE OF *LIFNIM MESHURAT HADIN*

Nahamanides, the great medieval legal scholar and philosopher, in explicating the methodology of the Torah,¹⁰ stated:

[S]uch is the way of the Torah, that after it lists certain specific prohibitions, it includes them all in a general precept. Thus, after warning with detailed laws regarding all business dealings between people such as not to steal . . . , He said in general "And thou shalt do that which is right and good,"¹¹ thus including under a positive commandment the duty of doing that which is right and agreeing to a compromise . . . as well as all requirements to act [*lifnim meshurat hadin*] for the sake of pleasing one's fellow man.¹²

The fact that the equitable concept is rooted in and derived from an actual commandment renders it as an incorporated aspect of the law itself. If the situation demands it, then one is both ethically and legally bound by the precepts of the Torah not to insist on one's rights as defined by the strict letter of the law but, rather, to agree to act beyond that narrow legalistic realm. An excellent illustration of this principle is one involving the question of liability of a money-changer (*Shulhani*) who errs in his assessments. The Talmud grants an exemption from liability for judgment errors to that category of people who are exceptional experts absolutely trained and competent in their field. It is then related¹³ that R. Hiyya made an erroneous judgment in his capacity as an expert money-changer and yet assumed liability for his mistake. The Talmud then reconciles R. Hiyya's act with the apparently contradictory law by concluding that R. Hiyya was motivated by the principle of *Lifnim*. The law (*Din*) can only impose a fixed, objective set of rules and guidelines to a certain class of situations which can only be of a general nature. On the other hand, *Lifnim* operates within what has been termed the

⁸ *Earl of Oxford's Case*, 1 Ch. Rep. 1 at 7, 21 E.R. 485 at 486.

⁹ Silberg, *Talmudic Law and the Modern State* (New York: Burning Bush Press, 1973) at 94.

¹⁰ The Hebrew Bible.

¹¹ Deuteronomy 6:18.

¹² Ramban (Nachamanides), *Commentary on the Torah — Leviticus*, trans. Chaval (New York: Shilo Publishing House, 1974) at 283-84.

¹³ The Talmud, *Nezikin I*, Baba Kamma 99b.

"sphere of contextual morality."¹⁴ R. Hiyya confronted the predicament at hand and did not blindly turn to a pre-formulated directive for guidance, but rather employed his own moral standards to accomplish that "which is right and good" under the unique and particular circumstances presented to him. The Talmud then continues exegetically to derive the principle of *Lifnim* from a verse in the Torah,¹⁵ which in effect burdened one with a formal obligation to look beyond strict legal principles when the rule of equity and good conscience demands it.

The basic make-up of the concept of *Lifnim*, though, is such that it is excluded from being utilized as a forensic tool in the formulation of legal rules. Talmudic law propounded the rule that gifts or sales subject to express or manifestly implied conditions remain voidable until such time as those conditions are fulfilled.¹⁶ The question is then raised as to how the rule should be applied to the hypothetical where a man sold a plot of land but on concluding the sale he was no longer in need of the money. The Talmud attempts a resolution of the matter based on the following actual occurrence: There was a certain man who sold land to R. Papa because he was in need of money to acquire oxen, and, as eventually the seller no longer needed the funds, R. Papa returned the land to him. The Talmud then rejects this as a valid proof since it is determined that R. Papa acted *Lifnim*. The Talmud proceeds to the conclusion, via the citation of a different case, that in such situations the sale may indeed be withdrawn.¹⁷ Actions influenced by the principle of *Lifnim* are deemed insufficient authority in resolving a certain undetermined state of a law. This is consistent with the essential purpose of *Lifnim*, which is "to evaluate and intuit the best way of eliciting maximal good from the existential predicament confronting him,"¹⁸ and not to formulate general rules governing categories of cases linked together by certain common denominators. It is often the practice of the Talmud that the actions of noted legal scholars and jurists are used as a basis for the formation and development of the law. Precedents can be set not only on the basis of what judges declare from the safety of the Bench, but on what they do in their capacities as members of the community at large. But, if their actions are prompted by subjective notions of justice transcending the strictly legal framework, then no *ratio* can be extracted. Since the influence of equity and good conscience can, as described by Selden's aphorism in relation to early English equity, "vary as the length of the Chancellor's foot," so R. Papa's personal actions could not form a constructive basis for eliciting a law of sale.

Unlike the separation between the ecclesiastical and civil courts in England, the nature of the Jewish legal system was such that it could not give rise to such a phenomenon. The same body of legislation and regulations

¹⁴ Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?", in Fox, ed., *Modern Jewish Ethics, Theory and Practice* (Columbus: Ohio State University Press, 1975) at 78.

¹⁵ Exodus 18:20.

¹⁶ The Talmud, *supra* note 5, at Nashim IV, Kiddushin 49b.

¹⁷ The Talmud, *id.* at Nashim II, Ketuboth 97a.

¹⁸ Lichtenstein, *supra* note 14.

governed both the religious and civil spheres of life, as both were viewed as a unified whole deriving their existence from the same Divine source. It is no surprise, then, to encounter the concept of *Lifnim* in legal discussions concerning matters of ritual which may enlighten us further as to its nature within the system as a whole. There is a requirement of a quorum of at least three people before a group is allowed to issue an "invitation" (*Zimun*) to each other to say the grace after a meal. According to the Talmud, the law is that one may be called to interrupt his meal in order to oblige another two who wish to perform *Zimun*, but two do not break to oblige one. An incident is then cited to the contrary where R. Papa and another paused in the midst of their meal for his son to perform *Zimun*. The Talmud dismisses this as a valid adverse authority in the same fashion it did with the previously mentioned incident involving R. Papa by attributing his actions to the influencing factor of *Lifnim*.¹⁹ Rashi²⁰ comments that R. Papa's benevolence in this case sprang out of his desire to show respect for his son. In R. Papa's assessment of the situation, the general rule of law covering the class of cases that have the common characteristic of three people eating as a group would result in an unconscionable act if applied strictly to the existential predicament confronting him at the moment. Again we see that the nature and purpose of *Lifnim* is to compensate for the inevitable situations arising in the realm of delicate interpersonal relationships which cannot possibly be governed justly or respectably by the general letter of the law. In order to subsist, human relations and society as a whole require something over and above a purely legalistic outlook on the part of the individual members of the community. An opinion quoted in the Mishnah²¹ characterizes such a strictly dogmatic attitude as wicked from the highest point of view by asserting that, "[h]e that says 'what is mine is mine and what is thine is thine' . . . some say that this is the type of Sodom."²² Though such a person acts within the confines of the law, he contributes to the disintegration of society by his insistence on viewing each individual as a self-contained bundle of legal rights.

III. THE JUDICIAL ROLE AND THE DUTY TO ARBITRATE

Whereas the principles of equity in Roman and English law could only be accommodated by the creation of separate legal institutions originating in the prerogative of the *Praetor* or the Chancellor, in Jewish law no such split occurred because the concept of *aequitas* (*Lifnim*) was incorporated into the very fabric of the Jewish *jus scriptum* (Torah) itself. In contradistinction to the Roman and English concept of appealing to "higher" bodies of law which are designated as the arbiters of justice founded on conscience, it seems that in Jewish law, *Lifnim* imposes a reciprocal duty on both the regular members of the judiciary and the individual members of the community to strive for

¹⁹ The Talmud, *supra* note 5, at Zera'im, Berakoth 45b.

²⁰ A Jewish medieval scholar who commented extensively on the Talmud.

²¹ The Mishnah, trans. Danby (London: Oxford University Press, 1974) at 457 — Pirke Aboth 5.10.

²² The author has interpreted this to mean "I insist on my legal right and all that I am legally entitled to and recognize in turn your legal rights. That is my sole guideline in life."

equitable results whenever possible. According to Rashi and Nahamanides, the commandment "to do that which is right and good," is in fact an order for contending parties to embark upon a process of compromise in order to reach an acceptable settlement before plunging into litigation. Alongside that duty, there exists a duty on the court to persuade the parties to submit to arbitration, rather than have it act in its strict judicial capacity to impose a settlement that does not tend to promote amicable relations. R. Judah ben Korha declared that "[s]ettlement by arbitration is a meritorious act [W]hat is the kind of justice with which peace abides?—We must say: Arbitration,"²³ the obvious reason being that the strict application of law does not always lead to peace between contentious civil litigants. The *Shulhan Aruch*²⁴ burdens the judge with a moral obligation, before commencing the case, to present a choice to the litigants as to whether they wish to proceed by strict law or by arbitration.²⁵ The code goes so far as to suggest that the judge has the reserve discretion to impose a settlement based on principles of arbitration and compromise, without consent of the litigants, where on the facts of the case no proper legal resolution of the matter can be arrived at with any reasonable degree of clarity. Such a ruling is consistent with the Talmudic maxim that in the end a judge's only concern and recourse is towards "what he actually sees with his own eyes."²⁶ In matters where he must rely on his own judgment, reasoning and common sense, the equitable principle of *Lifnim* is given the possibility of free rein over a judge's deliberations as to the case before him.

While examining the role that *Lifnim* plays as a judicial standard, it is of assistance to delve into the *Aggadic* or theologic usage of the term found in the Talmud. One passage relates that R. Ishmael bestowed a blessing upon G-d consisting of the following:

[May] Thy mercy . . . prevail over Thy other attributes, so that Thou mayest deal with Thy children according to the attribute of mercy and mayest on their behalf, stop short of the limit of strict justice!²⁷

G-d is then said to have nodded his head in agreement. Strict application of the law may result in judgments of such a harsh nature that society would not be able to sustain them. Judgments must be tempered by the principle of *Lifnim*, identified here with the attribute of mercy, and it seems that in his capacity as an arbitrator, the judge is called upon to reflect the manner in which the Absolute Judge conducts his court.

Another intriguing passage describes G-d's dispensation of justice in the following fashion:

While occupied with the Torah which Scripture designates as truth,' the Holy One will not [act *Lifnim*]; (but when sitting in) judgment, which is not designated by Scripture as 'truth', the Holy One . . . may [act *Lifnim*] towards mercy.²⁸

²³ The Talmud, *supra* note 5, at Nezikin III, Sanhedrin 6b.

²⁴ A definitive legal code compiled by Joseph Karo.

²⁵ *Id.*, at Hoshen Mishpat Laws of Judges 12:2 (as translated by the author).

²⁶ The Talmud, *supra* note 5, at Nezikin III, Sanhedrin 6b.

²⁷ The Talmud, *id.* at Zera'im, Berakoth 7a.

²⁸ The Talmud, *id.* at Nezikin IV, Abodah Zara 4b (emphasis added).

Truth, which the Talmud identifies with the Torah or the *jus scriptum*, is not necessarily sought after nor arrived at when dispensing judgments. The Talmud here offers us a provocative insight into the way it perceived the nature and goal of adjudicating an issue. It is not an exclusively truth-seeking process ("truth" in the sense of the Talmud's identification of it with the definitive legal compendium of human conduct, i.e., the Torah), but is concerned as well with meting out fairness and equity wherever possible. If Divine judgment itself allows *Lifnim* to enter its considerations even at the expense of what the Talmud terms "truth," then surely at the human level equity may prevail over "truth" to produce a fair and just verdict.

IV. LEGISLATED EQUITY

The *Maggid Mishneh*, a commentator on Maimonides' code, asserted:

the intention of the verse "to do that which is right and good," is to promote and maintain civilized relations between men. It would not have been fitting to command details, for the commandments of the Torah are eternal and immutable whereas man's characteristics vary according to the time and the unique individual. Therefore the Rabbis set down details falling under the principles *some of which they posted as absolute Din* (law) and others only by way of *Hasidut* (advisory in nature).²⁹

There are a few instances in the Talmud where the principle of "to do that which is right and good," is actually embodied by the Rabbis in concrete legislation. The verse provides a source of authority upon which the Rabbis could exercise a certain degree of innovation and creativity in keeping abreast of the rapidly changing social and economic conditions of the time. The precepts of equity posited by the Torah were, in effect, for active legislation. Although, as mentioned previously, they could not attribute any authority to precedents motivated by *Lifnim* as adequate proof for new enactments, they themselves could enact sorely needed legislation as a response to the demands of the times that people are required "to do that which is right and good." The following are notable examples of *Din* (law) emerging from principles of equity rather than being derived juristically from scriptural passages:

²⁹ *Mishneh Torah* (Tel Aviv: Am Olam, 1959) at *Maggid Mishneh* on the Rambam — *Hilkhot Shekhenim* 14:5. For similar expressions of the same idea see St. Thomas Aquinas, 1 *Summa Theologica*, trans. Fathers of the Dominican Province (New York: Benzinger Brothers, Inc., 1947) Pt. 1-11, Q. 96, Art. 6, at 1021:

The observance of some point of law conduces to the common weal in the majority of instances and yet, in some cases, is very hurtful. Since then the law-giver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case can arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.

See also: American Law Institute, 2 *Restatement of Torts* (St. Paul: American Law Institute Publishers, 1934) at 754:

Many statutes are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualifications that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment.

(a) *Dina Debar Mitzra* (Right of Preemption):³⁰ A person who possesses land abutting the land of a seller enjoys a right of preemption in regard to the land for sale. If the seller proceeds to sell to a third party, the abutter has the right to demand the transfer to himself of the field upon payment to the buyer of the original price agreed upon. The Rabbis introduced this law to remove the buyer for the sake of the neighbouring land-owner because of the verse "to do that which is right and good." The reason given is the fact that there is no difference to the seller as to whom he sells to as long as he gets the same value, plus the fact that it can be of utmost importance for the abutter to own adjoining tracts of land far outweigh any injury that may occur to the buyer on account of being removed from the land.³¹ It is interesting to note that since equity brought the law into existence, all applications of the rule to various manifestations of the situation were governed consistently by the same principle of equity. A number of exceptions were therefore appended to the general rule where it was deemed inequitable to the buyer or seller to have it enforced. In many ways this resembles the English maxim that "equity follows the law," or, as formulated by Lord Tomlin:

[I]n order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances, which attracts the equitable jurisdiction. . . .³²

Thus, for example, if removing the buyer will be to the detriment of the seller by prejudicing other intended transactions with the same buyer, the rule is excepted.³³ On the other hand, the buyer may be adversely affected if he belongs to a class of persons for whom the courts act as guardians, e.g., orphaned minors, and who command a higher degree of equity in commercial transactions. Their equity prevails over that of the abutter's.³⁴ Once the rule was grounded in equity it remained the decisive factor in all situations where various equities could conflict.

(b) *Shuma Hadra* (Right of Redemption):³⁵ In the Talmud, if a loan is based upon a written instrument, then the creditor has a right to have a writ of execution issued by the court authorizing him to seize the debtor's land in satisfaction of the debt. The Rabbis then added the *caveai* that such lands appraised and foreclosed by the creditor could always be redeemed by the debtor on payment of the original debt, because of the verse "to do that which is right and good." Again, the reason for this is that the creditor is not adversely affected by the return of the foreclosed property as it can be said to the creditor, "The only claim you had against the debtor is money and now you have it!" Thus the commandment to act conscionably burdens

³⁰ The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 108a.

³¹ The author has interpreted Rashi's commentary on the text (*id.*) to mean "a legal fiction was introduced in order to preserve the integrity of the law, i.e., the buyer was deemed an agent of the abutter; thus the closing of the deal with the buyer automatically transferred the property to the abutter."

³² *Maine and New Brunswick Electrical Power Co. v. Hart*, [1929] A.C. 631 (P.C.) at 640.

³³ The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 108b.

³⁴ *Id.*, and Mishneh Torah, *supra* note 29, at Hilkhoh Shekhenim 12:3.

³⁵ The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 16b and 35a.

the creditor with the obligation, by law, to return the property to its original owner. Once again equity governs throughout. The Talmud also rules that in the case where the creditor who foreclosed had sold the property to a third party, the original debtor's right of redemption is extinguished because his equitable rights cannot defeat the equity of a bona fide purchaser for value who obviously intended to own land.

(c) *Kofin Al Midat Sodom*: The "Sodom-like" character, as noted above, is depicted as one who will adamantly insist on his legal rights, even when relinquishing those rights would confer advantage on another while leaving no adverse effects whatsoever upon himself. The Talmud postulated a maxim that gave the law the power to prevent "Sodom" motivated acts, though grounded in legal right, from realizing themselves, or in effect to force one to forego his legal rights. If two heirs or partners (A and B) wish to divide an estate and A owns an adjoining plot of land, A has the first option to choose that portion of the estate abutting his property. Even though by strict law B need not oblige A, the courts can force B to submit to A's choice since failing to do so would be following the ways of "Sodom." Maimonides extracts from this rule the general principle that wherever a particular course of action would result in benefit to one party with no resulting detriment to a second party, the courts are granted the auxiliary power to force the neutrally affected party to concede.³⁶ As Talmudic jurisprudence developed, so did the number of such maxims come into force as bases for transforming moral imperatives into legal constructions. Some notable examples are: the creation of new categories of ownership not recognized by law "in the interests of peace";³⁷ progressive reforms in family law so as "to prevent ill-feeling" in familial relationships;³⁸ and the institution of legal fictions creating novel property rights to promote friendly relations and "prevent inevitable quarrels" among society's members.³⁹ We can see, though, that the manner in which equity operates to bring law into harmony with society differs from other instrumentalities devised to accomplish the same goal in that, as Sir Henry Maine quite accurately stated:

[I]ts claim to authority is grounded not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.⁴⁰

In the context of our topic, all law ought to conform with the sacred principle of "to do that which is right and good" which, in a sense, stands as the overseer and ombudsman of the law.

Indeed, a flurry of debates developed over the course of later centuries among Jewish legal scholars as to whether the courts had the power to sanc-

³⁶ Mishneh Torah, *supra* note 29, at Hilkhoh Shekhenim 12:3.

³⁷ The Mishnah, *supra* note 21, at Gittin 5:8-9.

³⁸ The Talmud, *supra* note 5, at Nashim II, Ketuboth 58b.

³⁹ Mishneh Torah, *supra* note 29, at Hilkhoh Gezela Vaaveda 17:8-9.

⁴⁰ Maine, *Ancient Law* (16th ed. London: Spottiswoode, 1897) at 27-28.

tion the use of the equitable principle of *Lifnim* with the full force of the law. Many were in favour of the courts' imposing equitable settlements where they saw fit to do so.⁴¹ But even those who have supported the sanctionability of equity have provided for the restriction of its use to only those cases where the liable party could oblige the court's verdict without excessive economic injury to himself. The courts were thus prevented from burdening an impecunious party with a *Lifnim* oriented settlement. Much of the debate has been sparked by the following incident cited by the Talmud; R. Judah once followed Mar Samuel into a crowded marketplace and asked, "If one found a purse here would one be legally entitled to it?" Mar Samuel answered in the affirmative. Then the question arose as to what the law would be if an Israelite came and indicated an identification mark. Mar Samuel answered that it must be returned. R. Judah was puzzled by the apparently contradictory rulings when Mar Samuel answered, "This is *Lifnim meshurat hadin*."

The Talmud further relates that the father of Samuel found some asses in the desert and returned them to their owner after a period of twelve months, which is depicted as an act of *Lifnim*.⁴² The reason his action is described as such is that, by Talmudic law, a presumption of abandonment arises on a lost article that lies unclaimed for an unduly long time. So Samuel's father, though fully entitled by law to maintain possession of the asses, parted with them in a personal desire to fulfil higher moral imperatives. Virtually all the scholars agree that in such a case the courts must attempt to persuade the finder to act in accord with *Lifnim* and relinquish his rights, with the only point of contention being the limits of the sanctions available to the court in imposing such an equitable solution.⁴³ With this passage we gain further insight into the multifarious dimensions of ethical jurisprudence projected by the concept of *Lifnim*. The uniqueness of this passage lies in the fact that it did not follow the customary procedure of deriving the ethical imperative of *Lifnim* from Scriptural verse. Tosefot⁴⁴ deals with this distinct feature by delineating separate categories of cases in which *Lifnim* is the operative and guiding principle of equity:

(a) those cases in which there is some general obligation or liability imposed across the board with certain classes of people enjoying an exclusive exemption, e.g., the expert money-changer. And;

(b) those cases in which there is a universal release from any strict legal obligations, as in the present case where no one is obliged, by law, to return the article.

There seems to be no need for Scriptural derivation in cases belonging to category (b), as the natural law of good conscience demands the return of lost articles when there is no resultant monetary loss to the finder. On the other hand, in category (a), where there is an apparent clash between the natural principles of equity and the positive law of exemption, the sources

⁴¹ See, for example, Mordecai's (Hebrew) commentary in the Mishneh Torah, *supra* note 29, at Baba Metz'a 2:157.

⁴² The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 24b.

⁴³ The sanctions range from simple verbal persuasion to the threat of excommunication.

⁴⁴ A compilation of extensive commentaries on the Talmud.

must be consulted in order to raise *Lifnim* to its esteemed position as the guardian of the spirit of equity within positive law (*Din*). The Rabbis recognized a dual nature of equity that, on the one hand, was inherent in the average moral sense of the community and required no backing to ensure its validity, while on the other hand was deemed to be premised on previously formulated (or, in our case, revealed) legal rules, i.e., "To do that which is right and good," in order to preserve a credible rule of law. Whether the Talmud attributed a conscientious action to the Divine source or not also depended on the degree of equity in the particular situation.

A prime example of a case falling under category (a) follows closely after the previously mentioned episode concerning lost articles. Under Jewish law there exists an obligation to assist a fellow citizen in loading and unloading animals. Relief from that obligation is provided for an elder whose dignity would suffer as a result of manual labour. An incident is then recounted where R. Ishmael ben R. Jose, in his own fashion, proceeded to fulfil the primary obligation of assistance. Immediately the question arose whether R. Ishmael was an elder for whom it was undignified. The Talmud resolved the dilemma with the by now familiar response that "He [acted *Lifnim*,] as it says in the Scriptures. . . ."⁴⁵ In this case R. Ishmael waived the privilege of exemption with which he was clothed as an elder and conducted himself as an ordinary member of the community. We are concerned here with much more than the relating of equitable guidelines of a mere advisory nature. Once again Maimonides embodies the principle within the corpus of his code as two separate laws:

(1) "One who walks the path of 'right and good' and [acts according to *Lifnim*], should always return a lost article regardless of whether it is dignified for him to do so."⁴⁶

(2) "... One who is a *Hasid*⁴⁷ and [acts according to *Lifnim*], even if he were the Supreme Court Chief Justice, and who sees his comrade's animal struggling under a heavy load should come to his assistance. . . ."⁴⁸

The fact that the "higher law" is given concrete form in a code of law permits the courts to take judicial notice of ethical precepts as a valid principle of legal decision-making. They acknowledged, in the words of Pound, that "ethics, too, is a science and not without principle."⁴⁹

V. QUASI-LEGAL MANIFESTATIONS OF *LIFNIM*

Various methods were developed by the courts that allowed them to express disapproval of certain acts that violated the spirit of *Lifnim*. They maintained only a quasi-legal status, however, since they were restricted to

⁴⁵ The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 30b.

⁴⁶ Mishneh Torah, *supra* note 29, at Hilkhoh Geze'la Vaaveda 11:17.

⁴⁷ Maimonides here is following his own definition of *Hasidut*, which he equates with the attribute of *Lifnim*, i.e., one who will go to extremes in order to attain a virtuous character (Mishneh Torah, *id.* at Hilkhoh Deot 1:5).

⁴⁸ Mishneh Torah, *id.* at Hilkhoh Rozeah 13:4.

⁴⁹ Pound, *Law and Morals* (Chapel Hill: University of North Carolina Press, 1924) at 63.

verbal sanctions by the court. Thus, certain phrases of castigation were used to prevent specific situations unconscionable in nature but within the strict line of the law. Impotent as far as any strict legal sanctions were concerned, the court could only utilize its power of persuasion and direct the unconscionable party to a higher sense of morality or power (Divine) which demands that justice be done rather than mere strict compliance with the law.

(a) *Mi Shepora*:⁵⁰ Under Jewish law, as long as a substantive act of possession is not exercised over an object, (e.g., pulling or raising it), a transfer of property remains incomplete. Therefore, if there was an agreement to sell and money exchanged hands but there was no act of possession with respect to the item in question, either party would be able to renege on the original agreement and cancel the transaction. Though the court cannot compel completion of the deal, since by law the withdrawing party is perfectly entitled to do so, it can subject him to the following censure: "He who punished the generations of the Flood, and of the Dispersion, the inhabitants of Sodom and Gomorrah, and the Egyptians at the [Red] Sea, He will exact vengeance of him who does not stand by his word."⁵¹ In the present case it has an effect similar to the English equitable maxim that "Equity looks upon what is done as that which ought to be done." Though English equity would treat the subject-matter of agreement in the same way as if the act contemplated had been completely executed, the Jewish courts could only resort to impressing that principle on the party's conscience by way of appeal to a "higher authority."⁵²

(b) *Laseth Yedei Shamayim*:⁵³ If A came, of his own free will, and admitted stealing from either B or C, in doubt as to which one, then A must pay the full amount stolen to B and C if he wishes to "fulfill his obligation towards heaven." By strict *Din*, however, he need only pay out the total amount stolen and divide it between B and C. The law again explicitly extends recognition to two forums, one of strict legal propositions and the other of human conscience and heavenly design, within which there exist varying standards of human conduct. Though powerless to enforce ethical imperatives, the courts devised their own unique methods which gained technical meanings and had the effect of pressuring the subjected party via an appeal to conscience and fear of a higher authority.⁵⁴ Severely limited in the sanctions that could be applied in such cases, the judge working within the Talmudic tradition realized that:

[He] is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.⁵⁵

⁵⁰ The Mishnah, *supra* note 21, at Baba Metz'a 48a.

⁵¹ The Talmud, *supra* note 5, at Nezikin I, Baba Metz'a 48a.

⁵² *Id.* A debate follows as to the form that the *Mi Shepora* takes. Abaye contends that it is a mere admonishment while Raba argues that it is an actual curse. (It must be realized that a curse in ancient times was as useful a sanction as any.)

⁵³ Mishneh Torah, *supra* note 29, at Hilkhoh Gezeila 4:9-10.

⁵⁴ For a host of other such examples, see Herzog, *Moral Rights and Duties in Jewish Law* (1929), 41 *Juridical Rev.* 60.

⁵⁵ Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 133-34.

VI. PHILOSOPHICAL ORIGINS OF EQUITY IN TALMUDIC LAW

It would be enlightening at this point in our study to interpolate a classic Talmudic debate, philosophic and exegetic in nature, as to the manner in which the Biblical origins of equity or "rightness" (*Yosher*) was perceived and the role it must be assigned within the framework of the Jewish legal system. The debate is concerned with an interpretive analysis of the verse "to do that which is right (*Yosher*) and good (*Tov*) in the eyes of the Lord," which, as has been discussed, is the very cornerstone of the Jewish concept of equity. We shall designate *Yosher* as Jewish equity and *Tov* as a standard of conduct falling short of *Yosher* or ideal justice.

This dual aspect of justice suggesting two corresponding modes of conduct or ethic perplexed the Rabbinic mind and provided fertile soil for the debate that followed between the two foremost Jewish legal scholars of their time: R. Akiba and R. Ishmael.⁵⁶ The argument focuses analytically on the relation between the two terms and the conclusion of the verse "in the eyes of the Lord." R. Akiba was of the opinion that *Tov* referred to the latter part of the verse while *Yosher* must refer to "the eyes of man." R. Ishmael maintained the contrary view that *Tov* referred to man and *Yosher* to the Divine. There is a subtle yet profound disagreement within the context of this exchange as to the fundamental definition and purpose attributed to *Yosher* by the Torah. R. Akiba seems to be acknowledging the fact that law and justice do not always coincide, since what is good in the eyes of the Lord may not necessarily be equitable when brought down to the level of man.

It is submitted that R. Akiba has formulated the basis for much of the discussion until now, which is that *Tov* and *Yosher*, the demands of G-d and those of society, the strict letter of the law and the ideal humane law *Lifnim*, not only occupy different positions on the scale of justice, but respectively possess competing objectives. On the other hand, R. Ishmael, who equates *Yosher* with the proscriptions of the Lord (strict law), advocates the view that an inherent sense of equity pervades the strict law ("in the eyes of the Lord") which must not be sacrificed, and indeed by definition is prevented from being sacrificed for the sake of a "higher" good in the eyes of man. The fact that a rule has been enshrined in the *Torah* or derived from it must be regarded by man as *Yosher*—not to be violated by individual subjective notions of *Tov* or law. If we replace "common law" with the "Jewish civil law," the following *dicta* of Lord Devlin seem to be an echoing of R. Ishmael's position:

The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles *which the ordinary man is expected to recognize as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principle they should be within his understanding and merit his approval.*⁵⁷

⁵⁶ Tosefta-Shekalim 2:2. The version is based on S. Lieberman's rendering of the texts in Tosefta Kipeshuta at 677.

⁵⁷ *Ingram v. Little*, [1961] 1 Q.B. 31 at 73, [1960] 3 All E.R. 332 (C.A.) at 351 (emphasis added).

We can detect sentiments of the opposing view of R. Akiba in a recent decision by Lord Denning M.R., in which he stated:

Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law.⁵⁸

An excellent illustration of a substantive legal argument arising out of the respective schools of thought is provided by the Mishnah pertaining to the manner in which the Temple treasury funds were allocated for the fiscal year.⁵⁹ On three separate occasions during the year, an individual was appointed to enter the vault and appropriate the requisite funds for the upcoming portion of the year. The fear arose that suspicion of embezzlement would be cast upon that individual since no one was allowed to accompany him into the vault. Accordingly R. Akiba held that he must not enter garbed in any clothes that could possibly conceal any funds, effectively muzzling any suspicion of theft. R. Ishmael, though, ruled that he must be searched upon entering and leaving the vault. R. Akiba would have concurred with R. Ishmael as to the essential rule of law, but in consideration of ideal justice and ethics, the embarrassment that would result if one were to follow R. Ishmael's procedure persuaded R. Akiba to innovate a progressive substitute that would pay due respect to human dignity without violating the spirit and rule of law. Since *Yosher* is what man must perceive in the codification and administration of the law, so it can be used as a judicial tool to circumvent the rigours often imposed by the strict law and arrive at more equitable solutions where "Justice is not only done but *seen to be done*". R. Ishmael's school of thought, which relies on the Supreme arbiter of *Yosher* and identifies strict law with *Yosher*, would tend to stunt judicial creativity by requiring the judge to disregard social notions of *Tov* in favour of the higher *Yosher* of strict law. The rule is resolved in favour of R. Akiba, thus paving the way for the concept of *Lifnim* to influence the progressive construction of Jewish law. Taken to their logical extremes and supplanted in the contemporary situation, the core of the debate is captured in the distinction drawn by Chief Justice Laskin, "[b]etween a purely formal, mechanical view of the law, antiseptic and detached, and a view of the law that sees it as purposive, related to our social and economic conditions, and serving ends that express the character of our organized society."⁶⁰

VII. IDENTIFICATION OF LAW WITH EQUITY

The unique manner in which *Lifnim* and the principle of equity were incorporated into Jewish law prevented it from following Pound's stages in the evolution of law in which equity matures and eventually hardens, sinking into decadence. Though it became a powerful tool in the shaping of Jewish law, it resisted temptations to assume the rigours and procedures of the strict law. The spheres of morality and ethics within which the principle of *Lifnim*

⁵⁸ *Re Vanderville's Trusts* (No. 2), [1974] Ch. 269 (C.A.) at 322.

⁵⁹ According to the thesis developed by Lieberman, *supra* note 56.

⁶⁰ Laskin, *The Function of the Law* (1973), 11 *Alta. L. Rev.* 118 at 119.

freely roams recognize no bounds from the perspective of the individual member of society and provide the background for judicial decision making.

One final illustration, belonging to a class of its own, shall assist us in determining the scope and regard that Jewish law reserved for equity in governing commercial relations. It is recorded that Rabba ben R. Huna hired some porters who, in the process of their labour, negligently broke a barrel of wine. In order to guarantee restitution Rabba exercised a lien on the workers' clothes in his possession. The workers then approached Rav who ordered Rabba:

"Return them their garments," he ordered. "Is that the law?" he enquired. "Even so," he rejoined, "[t]hat thou mayest walk in the way of good men." Their garments having been returned, they observed, "We are poor men, have worked all day, and are in need; are we to get nothing?" "Go and pay them," he ordered. "Is that the law," he asked. "Even so," was his reply: "and keep the path of the righteous."⁶¹

Rashi comments that the principle upon which the *Din* in this case was pronounced was that of *Lifnim*. Rabba was within his legal rights both to exercise a lien and to withhold wages and yet he was compelled, by law, to relinquish both of those rights. In stark contrast to the cases thus far discussed, Rabba suffered a substantial economic injury as a result of this decision. Strangely enough, this appears to be the sole occasion where the *Talmud* declares the direct enforceability of *Lifnim* as *Din*. The very texture of *Din* is woven with fine threads of ethics resulting in the case before us balancing injustices with a scale weighted in favour of the labourer. The Judge then turns to his discretionary power which derives its source from the concept of *Lifnim* in order to alleviate any hardships that may arise on different occasions. "To do that which is right and good" often demanded that law's goal of certainty sacrifice itself for the sake of individual justice.⁶²

Jewish law's concern for and recognition of the integration of equity as an essential constituent of law leading to justice manifests itself in an entire Mishnaic tractate devoting itself solely to the setting of ethical guidelines pointing to an enhanced moral and just life. The telling feature of "Ethics of our Fathers" (*Pirke Aboth*) is its location in the order concerning itself with Torts (*Nezikin*) and immediately follows those tractates that deal with the rules and procedures concerning the judiciary. Maimonides explains the significance of this in the following fashion:

Common laymen are not in as dire a need for this as are judges, for when laymen are not ethically constituted, the adverse effects are highly personal, whereas when the judge is not in command of an ethical character, he damages both himself and other members of society. Thus "Fathers" commenced with judicial standards of ethics ... (one of which points out) that the judge must always attempt a com-

⁶¹ The *Talmud*, *supra* note 5, at *Nezikin* I, *Baba Metz'a* 83a. (Verse quoted is from *Proverbs* 2:20.)

⁶² As M. Elon points out in his scholarly work *Hamishphat Haivri* at 179, this Talmudic passage provides a basis, according to one contemporary Jewish legal scholar, for the obligation of severance pay in Jewish law:

Judges have the power to draw money from masters in favour of their servants, wherever the situation arises which calls for "walking in the ways of good men and keeping the path of the righteous."

promise (instead of actual *Din*) and, if possible, never to enter upon a process of strict application of the law but to always apply the principles of compromise between two litigants,—this is the ideal.⁶³

An integral component of a judge's legal education consists of attaining an awareness of the principles of equity, fairness, and good conscience in order that he may apply those very principles wherever possible. He must be able to mitigate the harshness of the law when necessary and "not to rely over much on legality—on the technical rules of the law—but ever to seek those things which are right and true; for there alone will you find the road to justice."⁶⁴

The identity of Jewish law with the natural principle of justice is exemplified by the manner in which the treatise is introduced. It prologues its ethical pedagogy with a genealogy of the tradition of the law, tracing it back to the original source with the words, "Moses received the Torah at Sinai." R. Obadia Mibartinura, in his commentary on this passage, reflects the relationship between law and principles of equity by explaining:

Since this tractate is not derived from any explicit commandments of the Torah as are the other tractates, but is only morality and ethics, and since other civilizations' philosophers compiled treatises on ethics which sprang from their own hearts, the author here, therefore, commences with "Moses received the Torah . . ." that is to say that the ethical precepts contained in this tractate do not arise from any subjective notions of justice on the part of the Mishnaic scholars but rather these also originated at Sinai.⁶⁵

These are not arbitrary nor subjective fundamentals of justice but form an indigenous part of the strict law. The principles engendering equity are regarded as on par with law and, in fact, equity is "one of the names under which is concealed the creative force which animates the life of the law. . . ."⁶⁶

VIII. CONCLUSION

We have examined an early attempt at the incorporation of the rules and principles of equity into an institutional body of law. Though the principles of equity may, as Lord Evershed found, "illustrate, nay illuminate, but never precisely define, the concept which lies behind, understood but unexpressed,"⁶⁷ Jewish law has valiantly strived consistently to apply the "inexpressable." Talmudic jurisprudence on the development of equity as a conceptual and practical basis for a system of law provides us with a comprehensive portrayal of the manner in which the law approaches justice through the various devices that equity supplies for that purpose. The very terms in Hebrew that stand for the source book of all Jewish law, i.e., the Torah and the legal

⁶³ Author's translation of Maimonides, Introduction to *Commentary on the Mishnah* (Jerusalem: Mossad HaRav Kook, n. date) at 54-56.

⁶⁴ Denning, *The Road to Justice* (London: Stevens, 1955) at 6.

⁶⁵ See Obadia Mibartinura's (Hebrew) commentary on the Mishnah, *supra* note 21, at Mishnah Avot 1:1.

⁶⁶ Brutau, "Juridical Evolution and Equity," in Newman, ed., *Essays in Jurisprudence in Honor of Roscoe Pound* (New York: Bobbs-Merrill, 1962) at 84.

⁶⁷ Evershed, *Aspects of English Equity (Three Lectures)* (Jerusalem: Magnes Press, 1954) at 17.

system itself, the Halakha, suggest a far more flexible framework than strict text-book law. *Torah* translates as “teaching” or “guiding” while *Halakha* conveys the idea of “walking” or “directing” in the sense of a pathway. The law is neither fixed nor finalized but open-ended and pointed in the direction of justice. The Rabbis boldly declared that the most cherished ideal of *Shalom* (Peace) could not possibly prevail in a society governed solely by the strictures of the law: “Where there is strict justice there is no peace.”⁶⁸ So it is that the most tragic event of Jewish history is causally linked to a decadent and rigid system of law totally oblivious to and devoid of any sense of equity or good conscience. As “peace” cannot tolerate strict law if it is to prevail, so the city symbolizing peace could not endure the moral vacuum engendered by such a system prompting the Talmud to its painful conclusion that:

Jerusalem was destroyed only because they gave judgments therein in accordance with Biblical law . . . because they based their judgments [strictly] upon Biblical law, and did not go beyond the requirements of the law.⁶⁹

⁶⁸ The Talmud, *supra* note 5, at Nezikin III, Sanhedrin 6b.

⁶⁹ The Talmud, *id.* at Nezikin I, Baba Metzi’a 30b.